No. 14,520

IN THE

United States Court of Appeals

For the Ninth Circuit

MARK MYRES, also known as Mark Myers,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court of the United States for the District of Alaska, Fourth Judicial Division.

BRIEF FOR APPELLEE.

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Subject Index

Table of Authorities Cited

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JURISDICTION.

The jurisdiction of the District Court below was based upon the Act of June 6, 1900, c. 786, Section 4, 31 Stat. 322, as amended, 48 U.S.C. 101.

The jurisdiction of this Court of Appeals is invoked pursuant to the Act of June 25, 1948, c. 646, 62 Stat. 929, as amended, 28 U.S.C. 1291.

STATUTES AND RULES INVOLVED.

Section 50-5-3 of the Alaska Compiled Laws Annotated, 1949, provides:

"*Section 50-5-3. Driving while under influence of intoxicating liquor or drugs.* Any person who, while under the influence of intoxicating liquor or narcotic drugs, operates or drives any automobile, motorcycle or other motor vehicle upon any public street or highway in Alaska, shall, upon conviction thereof, be punished by a fine of not more than One Thousand Dollars, or by imprisonment for a period of not more than one year, or by both such fine and imprisonment."

Rule 29(a) of the Federal Rules of Criminal Procedure provides:

"Motion for Acquittal

(a) *Motion for Judgment of Acquittal.* Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right."

QUESTION PRESENTED.

Did the District Court err in denying the appellant's motion for judgment of acquittal at the close of all the evidence?

COUNTERSTATEMENT OF THE CASE.

A complaint was filed on the 29th day of March, 1954, with the United States Commissioner at Big Delta, Alaska, charging the appellant with the crime of Operating a Motor Vehicle While Under the Influence of Intoxicating Liquor, in violation of Section 50-5-3 of the Alaska Compiled Laws Annotated, 1949.

In a jury trial held before the same Commissioner, the appellant was found guilty and a judgment was duly entered. Appellant appealed the case to the District Court for the District of Alaska, Fourth Judicial Division, pursuant to Alaska statutes and procedure for a trial *de novo*. On the 9th day of June, 1954, appellant was brought to trial before a jury in the District Court.

Gene Morris, a Territorial policeman with four years experience as an officer, testified that on the 28th day of March, 1954, at approximately 1:30 a.m., he went to the scene of an accident at Big Delta Junction (T.R. 13), which is about ninety-seven (97) miles south of Fairbanks. There, he found the appellant bending over the body of Patricia Bower which was lying on the highway near appellant's pick-up truck. Morris detected the odor of alcohol on appellant's breath (T.R. 15), but could not describe any other physical condition at the time because it was dark and his assistance was needed in removing Patricia Bower. Before the accident, Patricia Bower, the companion of appellant, had been riding in the vehicle, from which, according to the appellant, she rolled out. (T.R. 109.)

After the ambulance arrived, Morris went to his office a short distance from the Junction where he questioned the appellant for ten or fifteen minutes. (T.R. 21.)

Morris testified that appellant's balance was impaired and he went to sleep at various times. Morris had seen the appellant when he was sober, semi-drunk and intoxicated, and in his opinion appellant was highly intoxicated. In addition appellant had admitted to him that he had drunk ten or twelve beers at Hunter's Lodge (T.R. 15, 16, 17.)

Sergeant Charles Althouse, an M.P. with seven years experience, had an opportunity to observe appellant at the scene and for a period of approximately two hours. (T.R. 50.) He testified that appellant was not too steady on his feet; his speech was slightly incoherent; the odor of alcohol was present on his breath; and, in his opinion, the appellant was drunk. (T.R. 51.) He also testified to being present at the times when the appellant admitted how much he had to drink earlier in the evening.

Corporal Edwin English, an Army photographer, took a picture of appellant about 3:30 on the morning of the 28th (T.R. 75) and testified to appellant's instability and sleepiness. His observation covered a period of an hour and fifteen minutes. In English's opinion, the appellant was under the influence.

The Government then rested its case and counsel for appellant moved for a judgment of acquittal which was denied by the trial court. (T.R. 87, 89.)

Appellant testified that he had gone to Hunter's Lodge about 5:30 p.m. (T.R. 95) and remained there until midnight or thereafter (T.R. 96); then he and Patricia Bower drove to Club Trio. He further testified that he did not think he drank over six bottles of beer at Hunter's Lodge. (T.R. 105.)

Al Marler and Jessie Taylor were called as witnesses by the appellant. Al Marler, who operates Hunter's Lodge and is a good friend of appellant, testified that he was not under the influence upon leaving the lodge, but had been drinking during the evening. (T.R. 121-126.) Jessie Taylor testified that he was the bartender at Club Trio and did not believe appellant was intoxicated at Club Trio. (T.R. 111.)

Appellant moved for a judgment of acquittal which was denied (T.R. 137) and the case was submitted to the jury, which returned a verdict of guilty.

Appellant moved again for a judgment of acquittal, or in the alternative, an order granting defendant a new trial before judgment was passed, the same being denied by the trial court.

ARGUMENT.

Appellant assigns as error the denial by the trial court of his motion for a judgment of acquittal at the close of all the evidence. The ground for this motion was that there was not sufficient evidence to establish that the appellant was under the influence of intoxicating liquor while operating his vehicle.

The fact that appellant was operating his vehicle at the time and place charged is not disputed. There remains only the question of whether there was sufficient evidence upon which a jury could find that appellant was under the influence of intoxicating liquor within the meaning of the statute at the time he was operating the vehicle, which was a fact to be determined by the jury from all the circumstances of the case. (*People v. Ekstromer,* 71 Cal. App. 239, 235 Pac. 69, 72 (1925).)

It is correct that none of the witnesses for the appellee saw the appellant operating his vehicle, but the Territorial Police Officer arrived at the scene within ten minutes of the accident. Morris testified to appellant's physical condition at that time and later during the early morning. (T.R. 15, 16, 22, 23.) He had observed the appellant before this accident when appellant was absolutely sober and when he was in various degrees of intoxication. (T.R. 16, 22.) In the opinion of the officer, appellant was highly intoxicated. (T.R. 16.) The testimony of the other two government witnesses was summarized above.

The Supreme Court of Oregon, in the case of *State v. Rand,* 166 Ore. 396, 111 P. 2d 82 (1941) held, "Whether or not anyone is under the influence of intoxicating liquor may fairly be considered a matter of common knowledge and a question which a witness, who is not an expert, is competent to answer. His opinion is admissible if he first shows that he had opportunity to observe that person's condition." (See *Bauer v. People,* 103 Col. 449, 86 P. 2d 1088 (1939).)

The testimony of these three witnesses with the admission of appellant to Morris and Althouse that he had between ten and twelve beers during the evening (T.R. 17, 50), would support the conviction and it was reasonable for the jury to infer that in appellant's condition, his ability to operate the truck was impaired to an appreciable extent.

Appellant has cited the case of *People v. Dingle,* 56 Cal. App. 445, 205 Pac. 705 (1922). There the court used an objective test by taking the ordinarily prudent man as a standard, whereas the majority of the other jurisdictions have followed a subjective one.

"Under the influence of intoxicating liquor" are words in common use. They are not words of a technical nature and are well understood by the laity, who know they refer to the impaired condition of thought and action and the loss of the normal control of one's faculties to an appreciable degree, caused by drinking intoxicating liquor. However, various state courts have set forth different tests for evaluating when a person is under the influence of intoxicating liquor to a degree necessary to sustain a conviction. Thus, it was held, in *Hasten v. State,* 35 Ariz. 427, 280 P. 670 (1929), where the defendant was prosecuted under a similar statute, that the extent of the influence of liquor required to justify a conviction under the statute was any influence of intoxicating liquor, however slight.

The Supreme Court of Oregon in *State v. Noble,* 119 Ore. 674, 250 P. 833, 834 (1926), adopted the dictum in the case of *State v. Rodgers,* 91 N.J. Law

212, 102 A. 433 (1917): "It will be noticed that it is not essential to the existence of the statutory offense that the driver of the automobile should be so intoxicated that he cannot safely drive a car. The expression 'under the influence of intoxicating liquor' covers not only all the well-known and easily recognized conditions and degrees of intoxication, but any abnormal mental or physical condition which is the result of indulging in any degree of intoxicating liquors and which tends to deprive him of that clearness of intellect and control of himself which he would otherwise possess."

Rule 29(a) of the Federal Rules of Criminal Procedure (18 U.S.C.A.) states, "The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses." The trial court ruled that the evidence was sufficient to support a conviction, since the motion was denied.

The following cases support the court's decision in that in each case, the evidence was held sufficient to affirm the conviction in the lower court. In the early case of *Commonwealth v. Lyseth,* 250 Mass. 555, 146 N.E. 18 (1925), where in addition to other evidence not set out, the accused was found at the scene of an automobile accident, one half hour after the happening thereof under the influence of intoxicating liquor. The conviction was sustained, the court merely say-

ing, "We accordingly assume the jury could find that the charges in the complaint had been proved." (See *State v. Steele,* 117 N.E. 2d 617 (Ohio, 1952).)

Evidence that the defendant's manner of walking was unsteady, his speech thick, face flushed, eyes red and his breath smelled of alcohol, together with the testimony of three witnesses that, in their opinion, he was under the influence of intoxicating liquor was held sufficient to sustain the conviction in *Bell v. State,* 122 N.E. 2d 466 (Ind. 1954).

Also, evidence that the accused was unsteady on his feet; that his breath smelled of alcohol; that he talked with a thick tongue, has been held sufficient to sustain a conviction for driving while under the influence of liquor. (*State v. Noble,* 119 Ore. 674, 250 P. 833; *State v. Ketter,* 121 Kan. 516, 247 Pac. 430 (1926).)

Appellant further contends that the circumstances are as consistent with his innocence as with his guilt, since appellant was in a state of shock. Neither the record nor the evidence shows that appellant was in shock. In fact, Sergeant Althouse, who was not a medical expert, but who had observed many cases of shock (T.R. 65-72), testified that no characteristics of shock were present until the intoxication had worn off. Then, appellant could possibly have been going into shock. (T.R. 67.)

The appellant has not taken an appeal from the judgment, but from a denial of a motion for judgment of acquittal. In the case of *Henderson v. United States,* 143 F. 2d 681, 682 (9th Cir. 1944), the court stated, "It is a familiar principle, which it is our duty

to apply, that an appellate court will indulge all reasonable presumptions in support of the rulings of a trial court and therefore that it will draw all inferences permissible from the record, and in determining whether evidence is sufficient to sustain a conviction, will consider the evidence most favorably to the prosecution."

This court has also disposed of appellants' final contention in the case of *Schino v. United States,* 209 F. 2d 67, 72 (9th Cir. 1954), wherein the court stated, "The theory upon which appellants rely, that in a circumstantial evidence case a conviction cannot be supported if the evidence is as consistent with innocence as with guilt, has been laid to rest in this Circuit by the Remmer case, at least where, as here, the question arises on a motion for a judgment of acquittal."

CONCLUSION.

For the reasons set forth heretofore, appellee respectfully submits that the trial court did not err in denial of the motion for judgment of acquittal and the judgment of conviction should be affirmed.

Dated, Fairbanks, Alaska,
August 5, 1955.

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